

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

DUSTIN B. DANIELS,

**Plaintiff,**

V.

THE UNITED STATES OF AMERICA,  
et al.,

## Defendants.

Case No.: 16-cv-02077-BTM (DHB)

**ORDER RE: JOINT MOTION FOR  
DETERMINATION OF DISCOVERY  
DISPUTE**

(ECF Nos. 55, 56)

## AND RELATED CROSS-CLAIM.

Presently before the Court is a Joint Motion for Determination of Discovery Dispute in which Defendants United States of America (“United States”), Systems Applications and Technologies, Inc. (“SA-TECH”), and Cardinal Point Captains, Inc. (“Cardinal”) (collectively “Defendants”) move to continue all pretrial deadlines and amend the Scheduling Order issued in this case. (ECF Nos. 55, 56.) Plaintiff Dustin B. Daniels (“Plaintiff”) opposes the motion. (*Id.*) After reviewing the Joint Motion and its attachments, the Court hereby **GRANTS IN PART** Defendants’ motion to amend, as set forth below.

1      **I. BACKGROUND**

2      On August 16, 2016, Plaintiff commenced this action by filing a Seaman's  
3      Complaint for Damages for Personal Injuries and for Maintenance and Cure against the  
4      United States. (ECF No. 1.) Plaintiff filed his Third Amended Complaint ("TAC"), the  
5      operative complaint, against the United States, SA-TECH, and Cardinal on August 21,  
6      2017. (ECF No. 46.) On September 5, 2017, the United States filed a Cross-Claim against  
7      Cardinal. (ECF No. 53.)

8      In the TAC, Plaintiff alleges he suffered personal injuries, including crush injuries  
9      and a fracture to his left leg, on or about August 19, 2014, while employed by Cardinal and  
10     serving as a member of the crew aboard a public vessel owned and/or controlled by the  
11     United States, and manned and/or controlled through Cardinal and SA-TECH. (ECF No.  
12     46 at ¶¶ 7-9.) Alleging causation, Plaintiff brings claims of Unseaworthiness, Jones Act  
13     Negligence, General Maritime Negligence, and Maintenance and Cure against the United  
14     States, SA-TECH, and/or Cardinal. (*Id.* at ¶¶ 10-22.) In his Prayer for Judgment, Plaintiff  
15     seeks, among other things, general damages, special damages (including future medical  
16     expenses, loss of wages, and loss of earning capacity), maintenance and cure, and  
17     consequential damages. (*Id.* at ¶ 22.)

18     The Court held an Early Neutral Evaluation Conference on March 22, 2017. (ECF  
19     No. 24.) The case did not settle. (*Id.*) However, as the parties expressed an interest in  
20     continuing settlement discussions, the Court ordered the parties to exchange available  
21     medical information, and set follow-up Status Conferences. (*See* ECF Nos. 26, 31.) On  
22     July 28, 2017, the Court held a second Status Conference. (ECF No. 43.) At the  
23     conference, Plaintiff's counsel represented that Plaintiff needed to undergo further medical  
24     testing before settlement discussions may continue. (*Id.*) On August 28, 2017, the Court  
25     held a Case Management Conference and issued a Scheduling Order. (ECF No. 50.)

26     In August 2017, Plaintiff underwent an MRI authorized by Cardinal. (ECF No. 55-  
27     8 at ¶ 3.) Based on the MRI results, Plaintiff's primary care doctor recommended that he  
28     be seen by an ankle specialist for surgery. (*Id.*) The surgery was authorized on November

1 8, 2017, and took place on December 28, 2017. (*Id.*; *see also* ECF No. 55-9 at ¶ 2.)

2 Plaintiff was informed by his surgeon that he will need three months to recover from  
3 his surgery and return to work. (ECF No. 55-9 at ¶ 2.) Defendants' expert, Steven N.  
4 Copp, M.D., an ankle orthopedic specialist and Defendants' retained expert, declares that  
5 based on his experience as an orthopedic surgeon, with a specialty in ankle reconstructive  
6 surgery, Plaintiff's surgery requires four to six months to recover. (ECF No. 55-2 at ¶¶ 2-  
7 4.) Dr. Copp states that this is "particularly true for a recovery sufficient to allow someone  
8 to engage in manual labor activity on or aboard uneven surfaces particularly with frequent  
9 movement of the standing surface requiring accommodation by the foot and ankle." (*Id.*  
10 at ¶ 4.) However, Plaintiff claims that he is currently unable to work at all, and that he is  
11 presently going to college and trying to re-train for new, light work. (ECF Nos. 55 at 9-  
12 10; 55-9 at ¶ 3.)

13 **II. DISCUSSION**

14 **A. Legal Standard**

15 "The district court is given broad discretion in supervising the pretrial phase of  
16 litigation." *Zivkovic v. S. Cal. Edison Co.*, 302 F.3d 1080, 1087 (9th Cir. 2002) (quoting  
17 *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 607 (9th Cir. 1992)). A court's  
18 scheduling order "may be modified only for good cause and with the judge's consent."  
19 Fed. R. Civ. P. 16(b)(4); *see also* *Zivkovic*, 302 F.3d at 1087. "Rule 16(b)'s 'good cause'  
20 standard primarily considers the diligence of the party seeking the amendment. The district  
21 court may modify the pretrial schedule 'if it cannot reasonably be met despite the diligence  
22 of the party seeking the extension.'" *Johnson*, 975 F.2d at 609 (quoting Fed. R. Civ. P. 16  
23 advisory committee's notes (1983 amendment)) (citations omitted). "Although the  
24 existence or degree of prejudice to the party opposing the modification might supply  
25 additional reasons to deny a motion, the focus of the inquiry is upon the moving party's  
26 reasons for seeking modification." *Johnson*, 975 F.2d at 609 (citing *Gestetner Corp. v.*  
27 *Case Equip. Co.*, 108 F.R.D. 138, 141 (D. Me. 1985)). "If that party was not diligent, the  
28 inquiry should end." *Id.* The party seeking to continue or extend the deadlines bears the

1 burden of proving good cause. *See Zivkovic*, 302 F.3d at 1087; *Johnson*, 975 F.2d at 608-  
2 09.

3 **B. Analysis**

4 In the Joint Motion, Defendants seek a five (5) month extension of all pretrial  
5 deadlines, arguing that Plaintiff's recovery from surgery needs to be complete before they  
6 can take his deposition and properly evaluate the potential damages. (ECF No. 55 at 4.)  
7 Defendants request that fact discovery be completed approximately seven (7) months after  
8 Plaintiff's surgery, and expert discovery be completed approximately eight (8) months after  
9 Plaintiff's surgery. (*Id.* at 8.) Defendants seek an extension of all other dates accordingly,  
10 including a Pretrial Conference date in March 2019. (*Id.* at 9.)

11 In response, Plaintiff argues that he would be greatly prejudiced by any unnecessary  
12 delay. (*Id.* at 12; *see also* ECF No. 55-9 at ¶ 3.) Plaintiff is married, the father of a young  
13 baby and a four year old child, and the primary bread winner for his family. (ECF No. 55-  
14 9 at ¶ 3.) Plaintiff asserts that although Cardinal did, long ago, pay him maintenance, he is  
15 currently unable to work at all, or earn any money, and Cardinal has not started paying  
16 maintenance since the time of his recent surgery. (*Id.*) Plaintiff does not see how he will  
17 be able to take care of his family if his court date is extended to 2019. (*Id.*) Accordingly,  
18 Plaintiff requests a shorter extension of the fact and expert discovery deadlines and no  
19 extensions of any other dates. (ECF No. 55 at 11-13.) Plaintiff previously agreed to a fact  
20 discovery deadline of May 21, 2018, and an expert discovery deadline of July 2, 2018. (*Id.*;  
21 *see also* ECF No. 55-8 at ¶ 5.) Thus, Plaintiff's agreed-to fact discovery deadline would  
22 be approximately five (5) months after his surgery.

23 Based on the foregoing, the Court finds good cause to grant an approximate sixty  
24 (60)-day extension of all upcoming dates<sup>1</sup> in the Scheduling Order. With such an  
25 extension, more than four (4) months will pass after Plaintiff's surgery before the fact

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28 <sup>1</sup> This excludes the rebuttal expert designation deadline of January 19, 2018,  
which remains in effect. (ECF No. 50 at ¶ 3.)

1 discovery deadline, giving Plaintiff what appears to be sufficient time to recover and allow  
2 time for his deposition to be taken. The extension of *all* dates in the Scheduling Order will  
3 also enable the parties and the Court to proceed in an orderly and logical fashion. Although  
4 Defendants request more time, they have not justified such a lengthy request, and the Court  
5 finds that Plaintiff would be prejudiced by any unnecessary delay.

6 **III. CONCLUSION**

7 Based on the foregoing, the Court modifies the Scheduling Order (ECF No. 50) as  
8 follows:

9 1. By June 5, 2018, each party shall comply with the disclosure provisions in  
10 Rule 26(a)(2)(A) and (B) of the Federal Rules of Civil Procedure. This disclosure  
11 requirement applies to all persons retained or specially employed to provide expert  
12 testimony, or whose duties as an employee of the party regularly involve the giving of  
13 expert testimony. **Except as provided in the paragraph below, any party that fails to**  
14 **make these disclosures shall not, absent substantial justification, be permitted to use**  
15 **evidence or testimony not disclosed at any hearing or at the time of trial. In addition,**  
16 **the Court may impose sanctions as permitted by Fed. R. Civ. P. 37(c).**

17 2. Any party shall supplement its disclosure regarding contradictory or rebuttal  
18 evidence under Fed. R. Civ. P. 26(a)(2)(D) by June 26, 2018.

19 3. All non-expert discovery shall be completed by all parties by May 11, 2018.  
20 All expert discovery shall be completed by all parties by July 31, 2018. “Completed”  
21 means that all discovery under Rules 30-36 of the Federal Rules of Civil Procedure, and  
22 discovery subpoenas under Rule 45, must be initiated a sufficient period of time in advance  
23 of the cut-off date, **so that it may be completed** by the cut-off date, taking into account  
24 the times for service, notice and response as set forth in the Federal Rules of Civil  
25 Procedure. **Counsel shall promptly and in good faith meet and confer with regard to**  
26 **all discovery disputes in compliance with Local Rule 26.1(a).** The Court expects  
27 counsel to make every effort to resolve all disputes without court intervention through the  
28 meet and confer process. If the parties reach an impasse on any discovery issue, counsel

1 shall file an appropriate joint motion within the time limit and according to the procedures  
2 outlined in Magistrate Judge David H. Bartick's Civil Chambers Rules, which are posted  
3 on the Court's website. **A failure to comply in this regard will result in a waiver of a**  
4 **party's discovery issue. Absent an order of the Court, no stipulation continuing or**  
5 **altering this requirement will be recognized by the Court.**

6 4. Please be advised that failure to comply with any discovery order of the Court  
7 may result in the sanctions provided for in Fed. R. Civ. P. 37, including a prohibition on  
8 the introduction of experts or other designated matters in evidence.

9 5. All dispositive motions must be filed by **September 7, 2018**. Counsel for the  
10 moving party must obtain a motion hearing date from the law clerk of the judge who will  
11 hear the motion. The period of time between the date you request a motion date and the  
12 hearing date may vary from one district judge to another. Please plan accordingly. Failure  
13 to make a timely request for a motion date may result in the motion not being heard.  
14 Motions in limine are to be filed as directed in the Local Rules, or as otherwise set by the  
15 district judge.

16 6. A Mandatory Settlement Conference shall be conducted on **November 16,**  
17 **2018 at 10:00 a.m.** in the chambers of Magistrate Judge David H. Bartick. Counsel shall  
18 submit settlement statements **directly** to Judge Bartick's chambers by **November 9, 2018**.<sup>2</sup>  
19 The parties may either submit confidential settlement statements or may exchange their  
20 settlement statements. Each party's settlement statement shall set forth the party's  
21 statement of the case, identify controlling legal issues, concisely set out issues of liability  
22 and damages, and shall set forth the party's settlement position, including the last offer or  
23 demand made by that party, and a separate statement of the offer or demand the party is  
24 prepared to make at the settlement conference. **The settlement conference briefs shall**

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27 2 Statements under 20 pages in length, including attachments and exhibits, shall  
28 be e-mailed to chambers at efile\_Bartick@casd.uscourts.gov. Statements exceeding 20  
pages in length, including attachments and exhibits, must be delivered directly to chambers.

1 not be filed with the Clerk of the Court.

2 All named parties, all counsel, and any other person(s) whose authority is  
3 required to negotiate and enter into settlement shall appear in person at the  
4 conference. The individual(s) present at the Mandatory Settlement Conference with  
5 settlement authority must have the unfettered discretion and authority on behalf of the party  
6 to: 1) fully explore all settlement options and to agree during the Mandatory Settlement  
7 Conference to any settlement terms acceptable to the party (*G. Heileman Brewing Co., Inc.*  
8 *v. Joseph Oat Corp.*, 871 F.2d 648, 653 (7th Cir. 1989)), 2) change the settlement position  
9 of a party during the course of the Mandatory Settlement Conference (*Pitman v. Brinker*  
10 *Int'l, Inc.*, 216 F.R.D. 481, 485-86 (D. Ariz. 2003)), and 3) negotiate a settlement without  
11 being restricted by any predetermined level of authority (*Nick v. Morgan's Foods, Inc.*,  
12 270 F.3d 590, 596 (8th Cir. 2001)).

13 Governmental entities may appear through litigation counsel only. As to all other  
14 parties, appearance by litigation counsel only is not acceptable. Retained outside corporate  
15 counsel shall not appear on behalf of a corporation as the party who has the authority to  
16 negotiate and enter into a settlement. **The failure of any counsel, party or authorized**  
17 **person to appear at the Mandatory Settlement Conference as required shall be cause**  
18 **for the immediate imposition of sanctions.** All conference discussions will be informal,  
19 off the record, privileged, and confidential.

20 7. If the trial will be a bench trial, Counsel shall file their Memoranda of  
21 Contentions of Fact and Law and take any other action required by Local Rule 16.1(f)(2)  
22 by November 28, 2018. Counsel do not need to file Memoranda of Contentions of Fact  
23 and Law if the trial will be a jury trial.

24 8. Counsel shall comply with the pre-trial disclosure requirements of Fed. R.  
25 Civ. P. 26(a)(3) by November 28, 2018. Failure to comply with these disclosure  
26 requirements could result in evidence preclusion or other sanctions under Fed. R. Civ. P.  
27 37.

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1           9. Counsel shall meet and take the action required by Local Rule 16.1(f)(4) by  
2 **December 5, 2018.** The parties shall meet and confer and prepare a proposed pretrial order  
3 containing the following:

4           1. A joint neutral statement to be read to the jury, not in excess of one  
5 page, of the nature of the case and the claims and defenses.

6           2. A list of the causes of action to be tried, referenced to the Complaint  
7 [and Counterclaim if applicable]. For each cause of action, the order shall  
8 succinctly list the elements of the claim, damages and any defenses. A cause  
9 of action in the Complaint [and/or Counterclaim] which is not listed shall be  
dismissed with prejudice.

10           3(a). A list of each witness counsel actually expect to call at trial with a brief  
11 statement, not exceeding four sentences, of the substance of the witnesses'  
12 testimony.

13           3(b). A list of each expert witness counsel actually expect to call at trial with  
14 a brief statement, not exceeding four sentences, of the substance of the  
15 witnesses' testimony.

16           3(c). A list of additional witnesses, including experts, counsel do not expect  
17 to call at this time but reserve the right to call at trial along with a brief  
18 statement, not exceeding four sentences, of the substance of the witnesses'  
19 testimony.

20           4(a). A list of all exhibits that counsel actually expect to offer at trial with a  
21 one-sentence description of the exhibit.

22           4(b). A list of all other exhibits that counsel do not expect to offer at this time  
23 but reserve the right to offer if necessary at trial with a one-sentence  
24 description of the exhibit.

25           5. A statement of all facts to which the parties stipulate. This statement  
26 shall be on a separate page and will be read to and provided to the jury. The  
27 parties are directed to meet with the assigned magistrate judge to work out as  
28 many stipulations of fact as possible.

29           6. A list of all deposition transcripts by page and line, or videotape  
30 depositions by section, that will be offered at trial.

31           7. In addition to filing proposed jury instructions in accordance with Fed.  
32 R. Civ. P. 51 and CivLR 51.1, the parties shall e-mail the proposed  
33 instructions in Word or Wordperfect form to Chambers. If a party disagrees  
34 with a particular instruction, the party shall submit an alternate instruction.

35           **The pretrial order requirements set forth in paragraphs 3(a)-(c), 4(a)-(b), and  
36 6 above, extend to evidence that counsel anticipate may be used on cross-examination,**

1 **including impeachment evidence.**

2 The Court encourages the parties to consult with the assigned magistrate judge to  
3 work out any problems in preparation of the proposed pretrial order. The Court will  
4 entertain any questions concerning the conduct of the trial at the pretrial conference.

5 10. Counsel for Plaintiff will be responsible for preparing the pretrial order and  
6 arranging the meetings of counsel pursuant to Civil Local Rule 16.1(f). By **December 12,**  
7 **2018,** Plaintiff's counsel must provide opposing counsel with the proposed pretrial order  
8 for review and approval. Opposing counsel must communicate promptly with Plaintiff's  
9 attorney concerning any objections to form or content of the pretrial order, and both parties  
10 shall attempt promptly to resolve their differences, if any, concerning the order.

11 11. The Proposed Final Pretrial Conference Order, including objections to any  
12 other parties' Fed. R. Civ. P. 26(a)(3) Pretrial Disclosures shall be prepared, served and  
13 lodged with the assigned district judge by **December 19, 2018,** and shall be in the form  
14 prescribed in and comply with Local Rule 16.1(f)(6).

15 12. The final Pretrial Conference is scheduled on the calendar of the Honorable  
16 Barry Ted Moskowitz on **January 9, 2019** at **3:30 p.m.**

17 13. A post-trial settlement conference before a magistrate judge may be held  
18 within 30 days of verdict in the case.

19 14. The dates and times set forth herein will not be modified except for good cause  
20 shown.

21 15. Briefs or memoranda in support of or in opposition to any pending motion  
22 shall not exceed twenty-five (25) pages in length without leave of a district court judge.  
23 No reply memorandum shall exceed ten (10) pages without leave of a district court judge.  
24 Briefs and memoranda exceeding ten (10) pages in length shall have a table of contents  
25 and a table of authorities cited.

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1       16. Plaintiff's counsel shall serve a copy of this order on all parties that enter this  
2 case hereafter.

3       **IT IS SO ORDERED.**

4       Dated: January 19, 2018

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6       Hon. Bernard G. Skomal  
7       United States Magistrate Judge

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